# Appendix 5

*Pro Se* Motion's for Rehearing

73,431

Original

No.73,431

In the Texas Court of Criminal Appeals at Austin

*

No.782,657

In the 262nd District Court of Harris County, Texas

*

CHARLES V. THOMPSON
Appellant

v.

THE STATE OF TEXAS
Appellee

*



APPELLANTS FIRST MOTION FOR LEAVE TO FILE MOTION FOR REHEARING

*

TO THE HONORABLE COURT OF CRIMINAL APPEAL OF TEXAS:

Appellant CHARLES V. THOMPSON Respectfully submits this motion for leave to file a motion for rehearing, together with this motion for rehearing, moving the Court to reconsider its opinion of October 24, 2001, where this Court affirmed Appellants conviction and vacated Appellants sentence remanding this case back to the trial court for a new punishment hearing, granting in part contentions made in appellants original and supplemental briefs. The Court should grant this Motion for leave to Motion for rehearing this case for the reasons stated in Appellant's Motion for Rehearing.

**MOTION FOR LEAVE**

Appellant Charles V. Thompson asks for leave Pro Se to File Appellant's first motion for rehearing.

## STATEMENT OF THE CASE

The appellant was charged with the felony offense of capital murder (T.51). The appellant entered a plea of not guilty to the offense (R.XI-6). After the jury found appellant guilty as charged in the indictment (T.198;R.XIII-62), they made an affirmative finding on the first special issue, (T.208;R.XV-56) and a negative finding on the second special issue (T.212-13;R.XV-58), and the trial court assessed the appellant's punishment at death (T.212-13;R.XV-58).

## CONCLUSION

On each rehearing point of error stated in appellant's first motion for rehearing, appellant respectfully submits that the motion for leave to file for rehearing should be granted and appellant's motion for rehearing should be fully considered and granted.

## APPELLANT'S FIRST MOTION FOR REHEARING

In support of appellant's first motion for rehearing, appellant urges each rehearing point of error below, and the following arguments and authorities. After the Court's consideration of those issues, appellant prays the above cause will be reversed.

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On October 24, 2001, the Texas Court of Criminal Appeals violated appellants rights to due process guaranteed him by the 14th Amendment to the U.S. CONST.and T.R.A.P. 47.1,

When in reversing the trial courts judgment, the Court of Criminal Appeals failed to reverse the guilt/innocence phase as it did the punishment phase of the trial See (slip opinion pgs.55-10).

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In this Courts slip opinion at pg. 5, the Court herein said: [I]n his fourth point of error, appellant claims the state conducted an interview with him while in custody pending charges in the instant case, by utilizing an under cover investigator without notifying his counsel or warning him of his rights, and then used the statements he made during that interrogation about his plans to commit another crime, against him at the punishment phase of the instant capital murder trial. Appellantssays those statements are erroneously admitted in violation of his Sixth Amendment Right to Counsel (RR.XIV- 164-165). Appellant Respectfully suggest in his objection that the court mistated his complaint in part where this Court in its slip opinion pg.5, stated "[A]gainst him at the punishment phase of the capital murder trial." To the contrary the brief stated the error occured "Throughout" the Trial "Not Just" the punishment phase. See appellants brief point of error NO.4, where in the appellant requested the court remand his case for a new trial or a new punishment phase hearing at pg.29, and dismiss at pg.36 in conjunction with the previous mentioned. Although the reviewing court was partially correct in the error complained of, the court was

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**APPELLANTS OBJECTIONS TO THIS COURTS' MATERIAL MISTATEMENTS**

In this Courts slip Opinion at pages 3,4 and 5, the Court herein Said: [I]n reviewing the legal and factual sufficiency of the evidence this Court looks at all of the evidence in light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. JACKSON v. VIRGINIA 443 U.S. 307 (1979)." This was a correct analysisibut the Court failed to address and apply Ex Parte Elizonde 947 S.W.2d 202,205 (Tex. Crim. App.1997). [W]hen conducting a legal sufficiency of the evidence review, an Appellate Court does "Not weigh the evidence tending to establish guilt against the evidence tending to establish innocence."Nor does the Court seek to assess the credibility of the witness on either side. (The Court) "View[s] the evidence in a manner favorable to the verdict of guilty...no matter how powerfull the exculpatory evidence may seem...or how credible the defense witness may appear."So long as the inculpatory evidence standing alone is enough for rational people to believe in the guilt of the defendant [the Court] simply [does] not care how much credible evidence is on either side." SeeiId. at 205-206. Under this analysis the appellant respectfully suggest in his objection that the court mistateddthe record from trial (RR.XII- 30- 31) and mistated it, in this Honorable Courts opinion (slip op.pg 4), [A]ppellants medical expert agreedtthat the injury to Hayslip's tongue was life threatining and also agreed that

Hayslip "Probably" would have died without medical intervention." TO The Contrary a careful reading of the trial record shows that Dr. Radalat did NOT quite go so far as to concede that the shooting did cause death. He said: "[T]HAT the gunshot wound, if not treated at all, "Could" be fatal." (RR.XII- 30-31). Not "Probably" "Would have died without medical intervention." AS this Court stated in its slip opinion at pages4. The appellant recognizes the difference between "COULD" bedfatal, and "PROBABLY would of died without medical intervention." This is a mistatement of the facts herein (RR.XII 30-31). Fact is Hayslip did recieve medical attention, but something went wrong see Dr. Marvin's testimony (RR.VOL.12,pp.13-14;pp.76-77), where he stated he was being sued for "Wrongfull Death!" FURTHERMORE:

How the causation statue §6.04 (a) was applied to appellants case along with the states efforts to Capitalize and take advantage of testimony (including some testimony of Dr. Radalat The defense expert) that Hayslip would have died, or at least "Could" have died, (again a mistatement of the fac facts/testimony herein i.e. diference between WOULD and COULD), as a result of the gunshot wound IF SHE HAD RECIEVED NO MEDICAL TREATMENT (RR.XII- 29?243). One question under section §6.04(a (a) is whether applicants conduct, by itself would have been insufficient to cause death. That question should be answered under the asumption that medical aid is unavailable, such as taking someone to a remote area. Whether or not

applicants conduct alone was sufficient or insufficient to cause death should take into account the "Countervailing" resourses available to the victim in a major City like Houston, Texas, where most wound victims don't die.

Applicant further argues evidence is Factually insufficient to support his conviction. The applicant contends that the verdict was contrary to the weight of the evidence and clearly unjust. The U.S. Supreme Court has held that a "Heightened degree or reliability" is required when the death penalty is involved, due to the uniqueness, severity and finality of the penalty. See LOCKET v. OHIO 438 U.S. 586, 605; 98 S.CT. 2954, 2965; 57 LEEd. 2d 973 (1978). Factual sufficiency review is an obvious and effective way to improve the reliability of the decision." With all due respect to this Honorable Court Applicant contends that under CLEWIS v.STATE 922 S.W. 2d 126, 129)(Tex. Crim. App.1996). [T]he court of appeals will set aside the verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust," Id.,i.e., the verdict is shocking to the conscience, or is clearly biased. Id. at 135.

Appellant contends that it is clearly biased that the appellant was denied access to evidence proving the Negligent Oxygen Starvation of Hayslip,(an act NOT concurrent to appellants), because the 3 Doctors and Hermann Hospital are being sued under the Texas Wrongful Death ACT, and are protected by privilage under the law and as stated by Attorney Sam Houston,

the medical parties Attorney representing them in the pending Civil Litigation for wrongful death of Hayslip (Info. not available at time of filing direct appeal) A due process error. Until such date the Wrongful death lawsuit is settled, appellant is barred legally from aproaching those Defendants for the "Truth of these matters." Furthermore, no evidence was presented that any action taken in attempting to save Hayslip's life were clearly sufficient to kill her. On the contrary Trial counsel tried to investigate See McCullough's testimony (RR.VOL.13,pp.14-18). Appellant suggest that the reviewing court has mischaracterized Dr. Radalat's testimony[s] and when this court stated in its slip opinion pg.4 [O]n the other hand, even appellants own expert agreed that Hayslip had sustained a life-threatining injury and would have died if she had not recieved medical care." This is not a "Factual Element in dispute" FACT is she did recieve medical care/attention after waiting some 6 hours (See Brothers testimony Mike Donaghy), (RR.Vol.11,pp.196-199 and pp.201-203 and pp.247-248). In the Hospital, while speaking to Doctors, family (RR.vol.12,pp.7), and investigators with the Harris County Sheriff's department. The reviewing Court addresses irrelevant and biased views in applying this to their "fact finding" decision process. The evidence supports a guilty verdict for murder of Cain, but not for capital murder under those circumstances, the only real issue remaining would be a new trial for murder.

**APPELLANTS ARGUMENT UNDER REHEARING POINTS OF ERROR NO.1 & 2**

On October 24, 2001, the Texas Court of Criminal Appeals violated appellants rights to due process guaranteed him by the 14th Amendment to the U.S. CONT. and T.R.A.P. 47.1 and Rule 78 (d),(e), when in affirming the trial courts judgment, the reviewing court failed to reverse the guilt phase using a proper legal frame work for legal and factual sufficiency review[s]. No rational jury could have found appellant guilty of capital murder by murdering more than one person during "The same criminal transaction." Tex. Penal Code Ann.§19.03(a)(7)(A). Even under principles of concurrent causation Tex. Penal Code §6.04(a) Causation. The applicant maintains that the evidence was insufficient to sustain a conviction for capital murder, in that it failed to show beyond a reasonable doubt that applicant was responsible for the death of Hayslip CONCURRENTLY with the Doctor.

1. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUSTAIN A CONVICTION FOR CAPITAL MURDER, SUCH THAT A CONVICTION VIOLATES DUE PROCESS OF LAW.

2. THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO SUSTAIN A CONVICTION FOR CAPITAL MURDER, SUCH THAT A CONVICTION VIOLATES DUE PROCESS OF LAW AND THE EIGHTH AMENDMENT.

The applicant next maintains that the evidence was legally insufficient to sustain a conviction for capital murder, in that it failed to show beyond a reasonable doubt that the applicant was responsible for the death of Hayslip concurrently.

The applicant contends that the evidence was legally insufficient, which would require acquittal of capital murder and remand for a new trial on murder, as well as, factually insufficient, which would only require a new trial for capital murder. See TIBBS v. FLORIDA 457 U.S. 31; 102 S.CT. 2211; 72 L.Ed 2d 652 (1982).

(a) Standard of review: For review of the legal sufficiency of evidence in a criminal case, Texas case law has adopted the standard articulated in JACKSON v. VIRGINIA 443 U.S. 307; 99 S.CT. 2781; 61EE.Edd 2d (1979). By this standard, the evidence is considered in the light most favorable of the verdic verdict. Then the court determines whether a rational jury, viewing the evidence in that manner, could have found that the State proved all elements of the offense beyond a reasonable doubt. The evidence favoring a finding of guilt is not weighed against "Countervailing evidence." Ex Parte ELIZONDO, 947 S.W. 2d 202,205(Tex. Crim. App.1997). The JACKSON principle is abstract, but in MALIK v. STATE, 953 S.W.2d 234(Tex.Crim.App 1997). The Court of Criminal Appeals gave specific guidlines for applying it. The Court Held:

[S]ufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case. Such a charge would be one that accurately sets out the law, is authorised by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. Id. at 204, As MALIK further noted,"The elements of the offense are not only principles of law which must be included. Also logically falling in that catagory is the law on "CONCURRENT CAUSATION," found in Tex. Penal Code §6.04(a):


11.

A person is criminally responsible if the result would not have occureddbut for his conduct, operating alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

The applicant will return to the application of this principle in subsection below.

Factual sufficiency review is a different story, at least on the surface. The concept of factual sufficiency was recognized as to defensive issue in MERAZ v. STATE, 785 S.W.2d 146 ( (Tex. Crim.App.1990). And applied to the State's burden of proof in CLEWIS v. STATE, 922 S.W.2d 126 (Tex. Crim.App.1996). CLEWIS explained that, "In factual sufficiency review, the reviewing court sets aside the distorting prism of viewing evidence "In light most favorable to the verdict." The evidence favoring the jury's guilty verdict is weighed against countervailing evidence to determine whether the jury's verdict was "So contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." The Court of Criminal Appeals has severelylimited the concept by dictating deference to juries with regard to the credibility and weight of evidence when there is a conflict. CAIN v. STATE 958 S.W.2d 404,407 (Tex.Crim Crim. App.1997). Since the appellate recognition of a conflict often depends on how finely the evidence is minced on review, the deference principle creates the posibility of Jonah swallowing the whale, so it becomes critical to identify the points on which genuine Factual conflict exist. Evidence contrary to the guilty verdict should not be discounted, in

the name of "Deference," simply because certain other evidence favors the legal conclusion urged by the State, Finally, since the burden of proof is upon the State, uncertainty should be resolved in favor of reversal.

COGNIZABILITY: Legal insufficiency of the evidence is cognizable on review. The answer should be answered affirmatively in a death penalty case, which is all that needs to be decided in the case at bar. While JACKSON v. VIRGINIA, a non-death penalty case, rested soley on due process grounds, a capital murder case involves the additional consideration of the eighth Amendment's ban on cruel or unusual punishment. (As judge MALONEY'S Dissent in SMITH v. STATE, 898 S.W.2d 838 (Tex. Crim.App.1995) explained, the due process clause & the eighth Amendment frequently overlap in the context of death-penalty cases. The need for factual sufficiency review is just another example of that). The Supreme Court has held that a "Heightened degree of reliability" is required when the death-penalty is involved, due to uniqueness, severity, and finality of the penalty. See LOCKET v. OHIO 438 U.S. 586, 605; 98 S.CT. 2954, 2965; L.Ed. 2d 973 (1978). Factual sufficiency review is an obvious and effective way to improve the reliability of the decesion. While finding that evidence is legally sufficient in a given case may rest in large part on the fiction that, in the eye's of the jury, the State's evidence was 100% believable and persuasive while the defense evidence was 100% unbelievable and weak, factual sufficiency review removes the distorting effect

effect of that fiction. Factual sufficiency review is the more realistic approach of the two, for in the real World, there are two sides to every coin.

APPLICATION OF LAW TO FACTS: The key issue in the trial was whether, as alleged, the appellant caused the death of Hayslip. The trial court charged the jury under TEX. PENAL CODE §6.04(a)

> AS FOLLOWS: A person is criminally responsible if the result would not have occured but for his conduct, opearating alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

(CR-191). This was a correct application of law, as far as it went, (in terms of satisfying Malik, the charge as a whole was defective for reasons stated in grounds below). But far from complete. The charge was deficient in that three germane definition found in the Penal Code should have been included to aid the jury's understanding of the causation concept. Under TEX. PENAL CODE §1.07(a)(10), the term "Conduct" means "an act or omission and its accompanying mental state." TEX. PENAL CODE §1.07(a)(1) further defines an "Act" as "a bodily movement, whether voluntary or involuntary, and such speach." TEX. PENAL CODE §1.07(a)(34) defines an "ommission" as "failure to act." How the causation statue applied to the applicant's conduct has been vigorously contested at every stage. In discussion at trial and on Direct Appeal, however, first the State tried to take advantage of testimony (including some from a Dr./Defense expert) that Hayslip would have died, or at least <u>could</u> have died, as a result of the gunshot wound IF SHE

HAD RECIEVED NO MEDICAL TREATMENT (RR.XII- 29,243). One question under section §6.04 is whether the applicants conduct, by itself, would have been insufficient to cause death. That question should not be answered under asumption that medical aid is compllletely unavailable, unless the actor takes some steppto make aid unavailable, such as taking someone out to a remote area and shooting him. Whether or not Defendant's conduct alone was sufficient or insufficient to cause death should take into account the countervailing resources available to the victim. In anmajor urban center like Houston, reasonably prompt medical aid is available. Most wound victims do not die.

On this point a useful analogy may be drawn to MOSLEY v. STATE, 983 S.W.2d 249 (Tex. Crim.App. 1998), where the Court of Criminal Appeals held that victim-impact evidence was admissible bacause the mitigation issue under TEX. CODE OF CRIM CRIM. PROC. Art. 37.071 asks whether mitigating evidence is sufficient. MOSLEY held that countervailing factors, particularly victim impact evidence, are relevant to that determination. By similar reasoning when the question before the jury is whether a defendant's conduct is sufficient to cause death, the modern reality of available medical countermeasures should be taken into account. With that in mind, the evidence was abundant that the gunshot wound was not what caused Hayslip's death.DDr. Radalat testified on direct examination that the gunshot wound was not inherently lethal and was survivable. ( (RR XII-233). Whether or not it would have done so if Hayslip

had recieved no medical treatment for it misses the point of what really actually happened. In fact the Doctors were able to treat the gunshot wound sucessfully, and the autopsy report said the wound exhibited noticeable healing by the time Hayslip died (SX-80,pp.2-3)in RR XVI). A second important point is that judicial interpretation of Section §6.04 should treat all words in the statue as having significance, including the word "CONCURRELTLY:" Here the doctors were in fact sucessful in stoping the lethal potential of the gunshot wound, before the bradycardia had its fatal effect. IN OTHER WORDS THE APPLICANTS CONDUCT AND THE DOCTORS' NEGLIGENCE OPERATED SEQUENTIALLY, NOT CONCURRENTLY, so the concurrent cause concept does not properly support a finding of sufficient evidence in this cause. Under a proper legal frame-work for legal sufficiency review, no rational jury could have found that the applicant actually killed Hayslip as well as Cain, even under principles of concurrent causation. The evidence supported a guilty verdict for murder but not for capital murder, which warrants a new trial for murder. The case fora simple reversal and retrial, based on factual insufficiency is even more compelling. The State's case rested on the idea that Hayslip would have died without treatment. Even accepting that to be fact, it is not a fact which directly conflicts with the evidence showing medical malpratice which rendered Hayslip Brain Dead. Therefore there is no basis for deference to the jurys crediblity determination as a way of avoiding the hard decision, their was no evidence

that the gunshot wound alone rendered her brain dead. While the overwhelming weight of the evidence supports that conclusion, only be tuning out completely the unplesant facts of medical malpratice and the familys hard choice in terminating life-support, could the jury and a reviewing court find the applic-ant killed Hayslip. While fiction underlying legal sufficiency review permits that, factual sufficiency review does not. Under those circumstances the only issue remaining would be punishment, andsa suitable relief could be granted by ordering a new punishment phase trial for murder.

**APPELLANTS PRO SE ARGUMENT UNDER REHEARING POINTS OF ERROR NUMBER 1,2 and 4.**

A Appellant incorporates herein all of his arguments at pgg pages 1-17 in his original brief[s].

**PRAYER ON REHEARING**

Appellant request this Court to grant rehearing, to sustain the foregoing points of error, to reverse the District Court's judgment and to order the appropriate relief.for whi

RESPECTFULLY SUBMITTED
PRO SE BY APPELLANT,

Charlee Victor Thompson

NOVEMBER 16 ,2001.

CHARLES V. THOMPSON
TDCJ-ID No: 999306
12002 F.M. 350 South
Livingston, Texas 77351

**VERIFICATION**

"I, Charles Victor Thompson #999306 being presently incarcerated in the POLUNSKY UNIT of TEXAS DEPARTMENT OF CRIMINAL JUSTICE - Institutional Division, in Polk County, Texas, verify or certify under penalty of perjury that I read the above and forgoing, **MOTION FOR LEAVE TO FILE MOTION FOR REHEARING and MOTION FOR REHEARING,** know the contents therein, and believe them to be true and correct, pursuant to Title 6 § 132.003 Texas Civil Practices and Remedies Code, and Title 28 U.S.C. § 1746.

Executed on this 16 day of November, 2001."

Charles Victor Thompson

Charles Victor Thompson
TDCJ-ID No: 999306
12002 F.M. 350 South
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APPELLANT/APPLICANT PRO SE

**CERTIFICATE OF SERVICE**

A true and correct copy of:

1. APPELLANTS MOTION FOR LEAVE TO FILE FOR REHEARING.

2. APPELLANTS MOTION FOR REHEARING.

3. VERIFICATIONS, AND CERTIFICATE OF SERVICE.

has been served upon the following listed parties by depositing the same, via First Class Mail, enclosed in a prepaid, properly addressed envelope, in a Post Office or Official Depository, under the care and custody of the United States Postal Service, on this the 16 day of November, 2001.

Charles Victor Thompson

Charles Victor Thompson
TDCJ-ID No: 999306
12002 F.M. 350 South
Livingston, Texas 77351

APPELLATE/APPLICANT pro se

The names and addresses of those served are as follows:

Charles Bacarise
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Houston, Texas 77210

State Prosecuting Attorney
P.O. BOX 12405
Austin, Texas 78711

Mr. Troy Bennett, Clerk for the TEXAS COURT OF CRIMINAL APPEALS.
P.O. BOX 12308
CAPITOL STATION
Austin, Texas 78711

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On October 24, 2001 the Texas Court of Criminal Appeals violated Appellants right to due process guaranteed him by the 14th Amendment to the U.S. CONST. and T.R.A.P. 47.1 and Rule 78 (e) when in affirming the trial courts judgment, this Court failed to reverse the guilt/innocence phase of appellants trial under a proper legal frame work for legal and factual sufficiency reviews. (See slip Op. pgs 3-5).

**APPELLANTS OBJECTIONS TO THIS COURTS' MATERIAL MISTATEMENTS**

In this Courts slip Opinion at pages 3,4 and 5, the Court herein Said: [I]n reviewing the legal and factual sufficiency of the evidence this Court looks at all of the evidence in light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. JACKSON v. VIRGINIA 443 U.S. 307 (1979)." This was a correct analysisibut the Court failed to address and apply Ex Parte Elizonde 947 S.W.2d 202,205 (Tex. Crim. App.1997). [W]hen conducting a legal sufficiency of the evidence review, an Appellate Court does "Not weigh the evidence tending to establish guilt against the evidence tending to establish innocence."Nor does the Court seek to assess the credibility of the witness on either side. (The Court) "View[s] the evidence in a manner favorable to the verdict of guilty...no matter how powerfull the exculpatory evidence may seem...or how credible the defense witness may appear."So long as the inculpatory evidence standing alone is enough for rational people to believe in the guilt of the defendant [the Court] simply [does] not care how much credible evidence is on either side." SeeiId. at 205-206. Under this analysis the appellant respectfully suggest in his objection that the court mistateddthe record from trial (RR.XII- 30- 31) and mistated it, in this Honorable Courts opinion (slip op.pg 4), [A]ppellants medical expert agreedtthat the injury to Hayslip's tongue was life threatining and also agreed that

Hayslip "Probably" would have died without medical intervention." TO The Contrary a careful reading of the trial record shows that Dr. Radalat did NOT quite go so far as to concede that the shooting did cause death. He said: "[T]HAT the gunshot wound, if not treated at all, "Could" be fatal." (RR.XII- 30-31). Not "Probably" "Would have died without medical intervention." AS this Court stated in its slip opinion at pages4. The appellant recognizes the difference between "COULD" bedfatal, and "PROBABLY would of died without medical intervention." This is a mistatement of the facts herein (RR.XII 30-31). Fact is Hayslip did recieve medical attention, but something went wrong see Dr. Marvin's testimony (RR.VOL.12,pp.13-14;pp.76-77), where he stated he was being sued for "Wrongfull Death!" FURTHERMORE:

How the causation statue §6.04 (a) was applied to appellants case along with the states efforts to Capitalize and take advantage of testimony (including some testimony of Dr. Radalat The defense expert) that Hayslip would have died, or at least "Could" have died, (again a mistatement of the fac facts/testimony herein i.e. diference between WOULD and COULD), as a result of the gunshot wound IF SHE HAD RECIEVED NO MEDICAL TREATMENT (RR.XII- 29?243). One question under section §6.04(a (a) is whether applicants conduct, by itself would have been insufficient to cause death. That question should be answered under the asumption that medical aid is unavailable, such as taking someone to a remote area. Whether or not

applicants conduct alone was sufficient or insufficient to cause death should take into account the "Countervailing" resourses available to the victim in a major City like Houston, Texas, where most wound victims don't die.

Applicant further argues evidence is Factually insufficient to support his conviction. The applicant contends that the verdict was contrary to the weight of the evidence and clearly unjust. The U.S. Supreme Court has held that a "Heightened degree or reliability" is required when the death penalty is involved, due to the uniqueness, severity and finality of the penalty. See LOCKET v. OHIO 438 U.S. 586, 605; 98 S.CT. 2954, 2965; 57 LEEd. 2d 973 (1978). Factual sufficiency review is an obvious and effective way to improve the reliability of the decision." With all due respect to this Honorable Court Applicant contends that under CLEWIS v.STATE 922 S.W. 2d 126, 129)(Tex. Crim. App.1996). [T]he court of appeals will set aside the verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust," Id.,i.e., the verdict is shocking to the conscience, or is clearly biased. Id. at 135.

Appellant contends that it is clearly biased that the appellant was denied access to evidence proving the Negligent Oxygen Starvation of Hayslip,(an act NOT concurrent to appellants), because the 3 Doctors and Hermann Hospital are being sued under the Texas Wrongful Death ACT, and are protected by privilage under the law and as stated by Attorney Sam Houston,

the medical parties Attorney representing them in the pending Civil Litigation for wrongful death of Hayslip (Info. not available at time of filing direct appeal) A due process error. Until such date the Wrongful death lawsuit is settled, appellant is barred legally from aproaching those Defendants for the "Truth of these matters." Furthermore, no evidence was presented that any action taken in attempting to save Hayslip's life were clearly sufficient to kill her. On the contrary Trial counsel tried to investigate See McCullough's testimony (RR.VOL.13,pp.14-18). Appellant suggest that the reviewing court has mischaracterized Dr. Radalat's testimony[s] and when this court stated in its slip opinion pg.4 [O]n the other hand, even appellants own expert agreed that Hayslip had sustained a life-threatining injury and would have died if she had not recieved medical care." This is not a "Factual Element in dispute" FACT is she did recieve medical care/attention after waiting some 6 hours (See Brothers testimony Mike Donaghy), (RR.Vol.11,pp.196-199 and pp.201-203 and pp.247-248). In the Hospital, while speaking to Doctors, family (RR.vol.12,pp.7), and investigators with the Harris County Sheriff's department. The reviewing Court addresses irrelevant and biased views in applying this to their "fact finding" decision process. The evidence supports a guilty verdict for murder of Cain, but not for capital murder under those circumstances, the only real issue remaining would be a new trial for murder.

**APPELLANTS ARGUMENT UNDER REHEARING POINTS OF ERROR NO.1 & 2**

On October 24, 2001, the Texas Court of Criminal Appeals violated appellants rights to due process guaranteed him by the 14th Amendment to the U.S. CONT. and T.R.A.P. 47.1 and Rule 78 (d),(e), when in affirming the trial courts judgment, the reviewing court failed to reverse the guilt phase using a proper legal frame work for legal and factual sufficiency review[s]. No rational jury could have found appellant guilty of capital murder by murdering more than one person during "The same criminal transaction." Tex. Penal Code Ann.§19.03(a)(7)(A). Even under principles of concurrent causation Tex. Penal Code §6.04(a) Causation. The applicant maintains that the evidence was insufficient to sustain a conviction for capital murder, in that it failed to show beyond a reasonable doubt that applicant was responsible for the death of Hayslip CONCURRENTLY with the Doctor.

1. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUSTAIN A CONVICTION FOR CAPITAL MURDER, SUCH THAT A CONVICTION VIOLATES DUE PROCESS OF LAW.

2. THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO SUSTAIN A CONVICTION FOR CAPITAL MURDER, SUCH THAT A CONVICTION VIOLATES DUE PROCESS OF LAW AND THE EIGHTH AMENDMENT.

The applicant next maintains that the evidence was legally insufficient to sustain a conviction for capital murder, in that it failed to show beyond a reasonable doubt that the applicant was responsible for the death of Hayslip concurrently.

The applicant contends that the evidence was legally insufficient, which would require acquittal of capital murder and remand for a new trial on murder, as well as, factually insufficient, which would only require a new trial for capital murder. See TIBBS v. FLORIDA 457 U.S. 31; 102 S.CT. 2211; 72 L.Ed 2d 652 (1982).

(a) Standard of review: For review of the legal sufficiency of evidence in a criminal case, Texas case law has adopted the standard articulated in JACKSON v. VIRGINIA 443 U.S. 307; 99 S.CT. 2781; 61EE.Edd 2d (1979). By this standard, the evidence is considered in the light most favorable of the verdic verdict. Then the court determines whether a rational jury, viewing the evidence in that manner, could have found that the State proved all elements of the offense beyond a reasonable doubt. The evidence favoring a finding of guilt is not weighed against "Countervailing evidence." Ex Parte ELIZONDO, 947 S.W. 2d 202,205(Tex. Crim. App.1997). The JACKSON principle is abstract, but in MALIK v. STATE, 953 S.W.2d 234(Tex.Crim.App 1997). The Court of Criminal Appeals gave specific guidlines for applying it. The Court Held:

[S]ufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case. Such a charge would be one that accurately sets out the law, is authorised by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried. Id. at 204, As MALIK further noted,"The elements of the offense are not only principles of law which must be included. Also logically falling in that catagory is the law on "CONCURRENT CAUSATION," found in Tex. Penal Code §6.04(a):


11.

A person is criminally responsible if the result would not have occureddbut for his conduct, operating alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

The applicant will return to the application of this principle in subsection below.

Factual sufficiency review is a different story, at least on the surface. The concept of factual sufficiency was recognized as to defensive issue in MERAZ v. STATE, 785 S.W.2d 146 ( (Tex. Crim.App.1990). And applied to the State's burden of proof in CLEWIS v. STATE, 922 S.W.2d 126 (Tex. Crim.App.1996). CLEWIS explained that, "In factual sufficiency review, the reviewing court sets aside the distorting prism of viewing evidence "In light most favorable to the verdict." The evidence favoring the jury's guilty verdict is weighed against countervailing evidence to determine whether the jury's verdict was "So contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." The Court of Criminal Appeals has severelylimited the concept by dictating deference to juries with regard to the credibility and weight of evidence when there is a conflict. CAIN v. STATE 958 S.W.2d 404,407 (Tex.Crim Crim. App.1997). Since the appellate recognition of a conflict often depends on how finely the evidence is minced on review, the deference principle creates the posibility of Jonah swallowing the whale, so it becomes critical to identify the points on which genuine Factual conflict exist. Evidence contrary to the guilty verdict should not be discounted, in

the name of "Deference," simply because certain other evidence favors the legal conclusion urged by the State, Finally, since the burden of proof is upon the State, uncertainty should be resolved in favor of reversal.

COGNIZABILITY: Legal insufficiency of the evidence is cognizable on review. The answer should be answered affirmatively in a death penalty case, which is all that needs to be decided in the case at bar. While JACKSON v. VIRGINIA, a non-death penalty case, rested soley on due process grounds, a capital murder case involves the additional consideration of the eighth Amendment's ban on cruel or unusual punishment. (As judge MALONEY'S Dissent in SMITH v. STATE, 898 S.W.2d 838 (Tex. Crim.App.1995) explained, the due process clause & the eighth Amendment frequently overlap in the context of death-penalty cases. The need for factual sufficiency review is just another example of that). The Supreme Court has held that a "Heightened degree of reliability" is required when the death-penalty is involved, due to uniqueness, severity, and finality of the penalty. See LOCKET v. OHIO 438 U.S. 586, 605; 98 S.CT. 2954, 2965; L.Ed. 2d 973 (1978). Factual sufficiency review is an obvious and effective way to improve the reliability of the decesion. While finding that evidence is legally sufficient in a given case may rest in large part on the fiction that, in the eye's of the jury, the State's evidence was 100% believable and persuasive while the defense evidence was 100% unbelievable and weak, factual sufficiency review removes the distorting effect

effect of that fiction. Factual sufficiency review is the more realistic approach of the two, for in the real World, there are two sides to every coin.

APPLICATION OF LAW TO FACTS: The key issue in the trial was whether, as alleged, the appellant caused the death of Hayslip. The trial court charged the jury under TEX. PENAL CODE §6.04(a)

> AS FOLLOWS: A person is criminally responsible if the result would not have occured but for his conduct, opearating alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.

(CR-191). This was a correct application of law, as far as it went, (in terms of satisfying Malik, the charge as a whole was defective for reasons stated in grounds below). But far from complete. The charge was deficient in that three germane definition found in the Penal Code should have been included to aid the jury's understanding of the causation concept. Under TEX. PENAL CODE §1.07(a)(10), the term "Conduct" means "an act or omission and its accompanying mental state." TEX. PENAL CODE §1.07(a)(1) further defines an "Act" as "a bodily movement, whether voluntary or involuntary, and such speach." TEX. PENAL CODE §1.07(a)(34) defines an "ommission" as "failure to act." How the causation statue applied to the applicant's conduct has been vigorously contested at every stage. In discussion at trial and on Direct Appeal, however, first the State tried to take advantage of testimony (including some from a Dr./Defense expert) that Hayslip would have died, or at least <u>could</u> have died, as a result of the gunshot wound IF SHE

HAD RECIEVED NO MEDICAL TREATMENT (RR.XII- 29,243). One question under section §6.04 is whether the applicants conduct, by itself, would have been insufficient to cause death. That question should not be answered under asumption that medical aid is compllletely unavailable, unless the actor takes some steppto make aid unavailable, such as taking someone out to a remote area and shooting him. Whether or not Defendant's conduct alone was sufficient or insufficient to cause death should take into account the countervailing resources available to the victim. In anmajor urban center like Houston, reasonably prompt medical aid is available. Most wound victims do not die.

On this point a useful analogy may be drawn to MOSLEY v. STATE, 983 S.W.2d 249 (Tex. Crim.App. 1998), where the Court of Criminal Appeals held that victim-impact evidence was admissible bacause the mitigation issue under TEX. CODE OF CRIM CRIM. PROC. Art. 37.071 asks whether mitigating evidence is sufficient. MOSLEY held that countervailing factors, particularly victim impact evidence, are relevant to that determination. By similar reasoning when the question before the jury is whether a defendant's conduct is sufficient to cause death, the modern reality of available medical countermeasures should be taken into account. With that in mind, the evidence was abundant that the gunshot wound was not what caused Hayslip's death.DDr. Radalat testified on direct examination that the gunshot wound was not inherently lethal and was survivable. ( (RR XII-233). Whether or not it would have done so if Hayslip

had recieved no medical treatment for it misses the point of what really actually happened. In fact the Doctors were able to treat the gunshot wound sucessfully, and the autopsy report said the wound exhibited noticeable healing by the time Hayslip died (SX-80,pp.2-3)in RR XVI). A second important point is that judicial interpretation of Section §6.04 should treat all words in the statue as having significance, including the word "CONCURRELTLY:" Here the doctors were in fact sucessful in stoping the lethal potential of the gunshot wound, before the bradycardia had its fatal effect. IN OTHER WORDS THE APPLICANTS CONDUCT AND THE DOCTORS' NEGLIGENCE OPERATED SEQUENTIALLY, NOT CONCURRENTLY, so the concurrent cause concept does not properly support a finding of sufficient evidence in this cause. Under a proper legal frame-work for legal sufficiency review, no rational jury could have found that the applicant actually killed Hayslip as well as Cain, even under principles of concurrent causation. The evidence supported a guilty verdict for murder but not for capital murder, which warrants a new trial for murder. The case fora simple reversal and retrial, based on factual insufficiency is even more compelling. The State's case rested on the idea that Hayslip would have died without treatment. Even accepting that to be fact, it is not a fact which directly conflicts with the evidence showing medical malpratice which rendered Hayslip Brain Dead. Therefore there is no basis for deference to the jurys crediblity determination as a way of avoiding the hard decision, their was no evidence

that the gunshot wound alone rendered her brain dead. While the overwhelming weight of the evidence supports that conclusion, only be tuning out completely the unplesant facts of medical malpratice and the familys hard choice in terminating life-support, could the jury and a reviewing court find the applic-ant killed Hayslip. While fiction underlying legal sufficiency review permits that, factual sufficiency review does not. Under those circumstances the only issue remaining would be punishment, andsa suitable relief could be granted by ordering a new punishment phase trial for murder.

**APPELLANTS PRO SE ARGUMENT UNDER REHEARING POINTS OF ERROR NUMBER 1,2 and 4.**

A Appellant incorporates herein all of his arguments at pgg pages 1-17 in his original brief[s].

**PRAYER ON REHEARING**

Appellant request this Court to grant rehearing, to sustain the foregoing points of error, to reverse the District Court's judgment and to order the appropriate relief.for whi

RESPECTFULLY SUBMITTED
PRO SE BY APPELLANT,

Charlee Victor Thompson

NOVEMBER 16 ,2001.

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**VERIFICATION**

"I, Charles Victor Thompson #999306 being presently incarcerated in the POLUNSKY UNIT of TEXAS DEPARTMENT OF CRIMINAL JUSTICE - Institutional Division, in Polk County, Texas, verify or certify under penalty of perjury that I read the above and forgoing, **MOTION FOR LEAVE TO FILE MOTION FOR REHEARING and MOTION FOR REHEARING,** know the contents therein, and believe them to be true and correct, pursuant to Title 6 § 132.003 Texas Civil Practices and Remedies Code, and Title 28 U.S.C. § 1746.

Executed on this 16 day of November, 2001."

Charles Victor Thompson

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APPELLANT/APPLICANT PRO SE

**CERTIFICATE OF SERVICE**

A true and correct copy of:

1. APPELLANTS MOTION FOR LEAVE TO FILE FOR REHEARING.

2. APPELLANTS MOTION FOR REHEARING.

3. VERIFICATIONS, AND CERTIFICATE OF SERVICE.

has been served upon the following listed parties by depositing the same, via First Class Mail, enclosed in a prepaid, properly addressed envelope, in a Post Office or Official Depository, under the care and custody of the United States Postal Service, on this the 16 day of November, 2001.

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